

## **RE: Freedom of Speech in Universities: Written Consultation**

**Date: 13 December 2017**

### **Introduction**

1. Christian Concern is a leading legal advocacy group in the United Kingdom dedicated to proclaiming, through law and policy, the Gospel message of Jesus Christ. We have acted as counsel of record for several of the applicants in the seminal case of *Ewedia and Others v. the United Kingdom*, and have taken part in many of the precedent setting cases involving freedom of thought, conscience, and religion and freedom of expression in the United Kingdom. Christian Concern's cases are frequently covered by British print and broadcast media.

### **The Issue**

2. An alarming trend of limiting freedom of expression on university campuses has become more and more aggressive in recent years. As Spiked Online has reported, 43 % of British Universities have implemented speech codes and policies which limit religious expression.<sup>1</sup> Evidence also shows that no less than 108 universities in the United Kingdom have actively censored free speech, or have done so through over-regulation.<sup>2</sup>

3. Christian Concern has supported Felix Ngole<sup>3</sup> before the High Court in relation to his removal from his social work course for comments he made on Facebook relating to his Christian beliefs on sexual purity. Felix was told that, by posting his comments on Facebook, he "*may have caused offence to some individuals*" and had "*transgressed boundaries which are not deemed appropriate for someone entering the Social Work profession.*" The case represents an egregious incidence of viewpoint discrimination whereby Felix has been disciplined not for the subject matter he addressed, but for the side he took in the debate. The case highlights the reality that some universities are seeking to create a bar to certain professions which would make it impossible for authentic Christians to practice those vocations.

4. Additionally, we continue to support Edward Phelan, also from the University of Sheffield, to whom the University has formally issued a letter of apology for making derogatory comments about the Christian faith, over personalising marking feedback by criticising his Christian faith, and not allowing him to pursue an academic paper of his choice because it had Christian elements in it.

5. Christian Concern has also widely commented on Balliol College's banning of the Christian Union from its Freshers' Fair.<sup>4</sup> This is not the only time a Christian Union has been discriminated

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<sup>1</sup> <http://www.spiked-online.com/free-speech-university-rankings/results#.WjEPJ991-Ul>.

<sup>2</sup> *Id.*

<sup>3</sup> <http://www.christianconcern.com/cases/felix-ngole>.

<sup>4</sup> See e.g.: <http://www.christianconcern.com/media/lbc-nick-ferrari-interviews-tim-dieppe-about-balliol-college-cu-freshers-fair-ban>; <http://www.christianconcern.com/media/lbc-speaks-roger-kiska-balliol-college-oxford-banning-christian-union>; <http://www.christianconcern.com/media/jon-gaunt-show-interviews-tim-dieppe-about-balliol-college-oxford>; and <http://www.christianconcern.com/media/premier-radio-interviews-roger-kiska-about-balliol-college-oxford-barring-cu-from-freshers-fair>.

against in relation to freedom of expression. At Edinburgh University, for example, the Christian Union was prohibited from running a course on sexual ethics anywhere on campus because it was deemed “offensive” to homosexuals.<sup>5</sup>

## The Law

6. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as transposed into United Kingdom domestic law vis-à-vis the Human Rights Act 1998, provides the right to freedom of expression in the following terms:

*(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

7. Article 11 of the Charter of Fundamental Rights of the European Union defines the right thus:

*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*

*2. The freedom and pluralism of the media shall be protected.*

8. Section 29JA in the Public Order Act 1986, as tabled by Lord Waddington, states that: “*In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred*”.

9. Furthermore Clause 29J of the Racial and Religious Hatred Act 2006 reads: “*Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*”

10. Article 13 of the International Covenant on Economic, Cultural and Social Rights<sup>6</sup> is one of many binding international treaties that establishes a right to education. The Committee responsible for compliance with the Convention, has stated that: “In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students.<sup>7</sup> It has therefore inferred into Article 13 a human right to academic freedom.<sup>8</sup> Additionally, as recalled by Recommendation

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<sup>5</sup> Defending your Christian Union, The Christian Institute (May 2007).

<sup>6</sup> United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966.

<sup>7</sup> Committee on Economic, Social and Cultural Rights, General Comment 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 70 (2003).

<sup>8</sup> *Id.*, §38-40.

1762 (2006) of the Parliamentary Assembly of the Council of Europe, history has proven that violations of academic freedom and school autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation.<sup>9</sup> Both Article 13 and the PACE Recommendation recognise the unique role of universities as market places which foster free thinking and new ideas. Universities, rather than censoring speech and inhibiting free thinking, should actively be promoting the right of students to think, hear, develop and express autonomous views.

## The Jurisprudence

11. The concept of protecting free speech is recognised in common law. The House of Lords has made it abundantly clear that the expression of political opinion and information is fully protected. In *Shayler*, the Lords considered the role of protecting freedom of expression as a safeguard of participatory democracy.<sup>10</sup> Baroness Hale, in the *Campbell* case, held that political speech is worthy of the highest protection; while intellectual, education and artistic speech is also important.<sup>11</sup>

12. Parliament, with the Human Rights Act 1998, established freedom of expression as a fundamental human right. The European Court of Human Rights [“ECHR”] has repeatedly held that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self fulfillment.”<sup>12</sup> The ECHR has also held on numerous occasions that freedom of expression must be protected. The court has explicitly stated that freedom of expression protects not only the “‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also [protects] those that offend, shock or disturb . . . . Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’”<sup>13</sup> While freedom of expression is subject to exceptions in Paragraph 2 of Article 10, these exceptions “must, however, be construed strictly, and the need for any restrictions must be established convincingly.”<sup>14</sup>

13. While Article 10 does provide for interference with freedom of expression for the purpose of protecting national security and preventing crime, any such interference must nonetheless be narrowly tailored and deemed necessary in a democratic society.<sup>15</sup> Any interference with freedom

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<sup>9</sup> §A(4.3).

<sup>10</sup> *R v. Shayler* [2002] UKHL 11, [2003] 1 A.C. 247, para. 21.

<sup>11</sup> *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499.

<sup>12</sup> E.g., *Dichand v. Austria*, App. No. 29271/95 § 37 (Eur. Ct. H.R. Feb. 26, 2002),

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60171>; *Marônek v. Slovakia*, 2001-III Eur. Ct. H.R. 337, 349; *Thoma v. Luxembourg*, 2001-III Eur. Ct. H.R. 67, 84; see also *Şener v. Turkey*, App. No. 26680/95 § 39(i) (Eur. Ct. H.R. July 18, 2000), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58753>; *Lingens v. Austria*, 103 Eur. Ct. H.R. 11, 26 (1986).

<sup>13</sup> *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976); accord *Dichand*, App. No. 29271/95 § 37; *Marônek*, 2001-III Eur. Ct. H.R. at 349; *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Jerusalem v. Austria*, 2001-II Eur. Ct. H.R. 69, 81; *Arslan v. Turkey*, App. No. 23462/94 § 44(i) (Eur. Ct. H.R. July 8, 1999), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58271>; *De Haes v. Belgium*, 1997-I Eur. Ct. H.R. 198, 236; *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 483, 500; *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at 23 (1994); *Thorgeir Thorgeirson v. Iceland*, 239 Eur. Ct. H.R. (ser. A) at 27 (1992); *Oberschlick v. Austria*, 204 Eur. Ct. H.R. (ser. A) at 25 (1991); *Lingens*, 103 Eur. Ct. H.R. at 26; *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

<sup>14</sup> *Şener*, App. No. 26680/95 § 39(i); accord *Thoma*, 2001-III Eur. Ct. H.R. at 84; *Observer & Guardian v. United Kingdom*, 216 Eur. Ct. H.R. (ser. A) at 30 (1991).

<sup>15</sup> See e.g.: *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A No. 178, § 61. See also: *Worm v. Austria*, judgment of 29 August 1997, Reports 1997-V, § 47.

of expression must be based on just reasons that are both “relevant and sufficient.”<sup>16</sup> Authorities have a duty to remain impartial and neutral with regard to the content of speech, since what is at stake is the preservation of pluralism and the proper functioning of democracy, even when those authorities may find some of those views irksome.<sup>17</sup> Clearly, when a university is allowed to dictate what is and what is not offensive and to punish speech it deems offensive, a *de facto* case of viewpoint discrimination is established and a project of social engineering is embarked upon. For these reasons, “any interference [with freedom of expression] must correspond to a ‘pressing social need’; thus, the notion ‘necessary’ does not have the flexibility of such expressions as ‘useful’ or ‘desirable.’”<sup>18</sup>

14. This means, that while universities owe a statutory duty which may incur some interference with Article 10, pursuant to Prevent’s aim to ‘have due regard to the need to prevent people from being drawn into terrorism’<sup>19</sup>, that nonetheless, any interference with speech must be reviewed with strict scrutiny and be narrowly tailored.

15. When a university is given *carte blanche* to determine which speakers are to be deemed ‘extremist’ and which are not, they are in fact being given license to determine which views it deem acceptable while censoring dissenting views. This is nothing short of viewpoint discrimination and an affront to Article 10 of the Convention.

16. For example, following the Queen’s speech on the 21<sup>st</sup> of June on extremism, the issue has been addressed on several occasions during debates in both the House of Commons and House of Lords. During those debates, Baroness Jones of Moulsecoomb of the Green Party rightly told the Lords that in the current political culture, we can only imagine how some elected officials would wish to define what an “extremist” actually is. Fiona Bruce reminded the Commons that we must be very careful in how we define extremism, a task which the Government has yet to satisfactorily undertake.

## Conclusion

17. Freedom of expression is a fundamental component of any democratic society and one of the cornerstones of British values. When we provide overly broad powers to serve otherwise legitimate aims, like protecting national security, a very real danger exists that these powers be used to suppress lawful speech because of viewpoint discrimination. Together with limitations on freedom of expression at university campuses, there has grown a trend of intolerance and discrimination against Christians as well.<sup>20</sup> The two trends go hand in hand, and act as watermarks for the sharp decline of democratic values within the United Kingdom in its zeal to uphold the current cultural *zietgiest*. For this reason, any limitation to freedom of expression must be easy to

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<sup>16</sup> *Zana v. Turkey*, 1997-VII Eur. Ct. H.R. 2533, 2548; see also Dudgeon, 45 Eur. Ct. H.R. (ser. A) at 22 (addressing the requirement of relevancy and sufficiency in Article 8).

<sup>17</sup> *United Communist Party of Turkey v. Turkey*, 1998-I Eur. Ct. H.R. 1, 27.

<sup>18</sup> *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 ¶ 116 (Eur. Ct. H.R. June 14, 2007), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81067>.

<sup>19</sup> See: Section 26 of the Counter-Terrorism and Security Act 2015.

<sup>20</sup> Ambassador Janez Lenarcic, Director of the OSCE Office for Democratic Institutions and Human Rights (“ODIHR”), has acknowledged the need for action to stem the tide of censorship of Christian speech, stating, “*What came out clearly from this meeting is that intolerance and discrimination against Christians is manifested in various forms across the OSCE area . . . . While denial of rights may be an important issue where Christians form a minority, exclusion and marginalization may also be experienced by Christians where they comprise a majority in society.*” See: Press Release, Org. for Sec. & Co-operation Eur., Intolerance and Discrimination Against Christians Needs to be Addressed, Concludes OCSE Meeting (Mar. 4, 2009) (summarizing the issues raised at an OSCE meeting concerning escalating discrimination against Christians in Europe).

access, as well as clear and precise in order that the public may govern its actions accordingly.<sup>21</sup>  
And under no circumstances should universities have unfettered discretion in determining the limitations to freedom of expression.<sup>22</sup>

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<sup>21</sup> See: *Ezelin v. France*, 202 Eur. Ct. H.R. (ser. A) at 21–22 (1991).

<sup>22</sup> Cf. *Metropolitan Church of Bessarabia v. Moldova*, 2001-XII Eur. Ct. H.R. 81, 111.